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U.S. Department of Labor Indicates It Will Look at Compensability of Employee Efforts Involving Off-Schedule and Off-Premises Use of Electronic Devices

In Its Spring 2015 Regulatory Agenda for 2015 the U.S. Department of Labor has indicated that its Wage and Hour Division will be developing and publishing – in August 2015 – a pre-rule Request for Information to solicit comments from interested and affected parties “...on the use of technology, including portable electronic devices, by employees away from the workplace and outside of scheduled work hours.” The Request will address the issue of whether employees’ handling emails, texts, and other electronic contacts as part of their employment but outside regular work hours and off the employer’s premises, is compensable time. The 1946 U.S. Supreme Court decision in the case of *Anderson v. Mt. Clemons Pottery Co.* [328 U.S. 680 (1946)] noted that “...a few seconds or minutes of work beyond the scheduled working hours” constituted a trifling amount of time that could be considered non-compensable under a *de minimis* standard. The Request will receive comments as to whether employer pressure for employees to be “always available” via electronic devices necessitates a revision of the standard in favor of increased compensability for time spent in such off-schedule responses.

Proposed Rules Published on “White Collar Job Exemptions” to Salary and Overtime Requirements of Federal Fair Labor Standards Act

In March of 2014, the President issued a presidential memorandum to the U.S. Secretary of Labor directing the Secretary “to modernize and streamline the existing overtime regulations for executive, administrative, and professional employees.” On July 6, 2015, the Department of Labor published a proposed rule affecting the standards for those employees. Comments are being accepted by the Department of Labor through September 4, 2015 before a final rule is promulgated.

Under the proposed rule:

- Executive employees (defined at 29 CFR 541.100-106 to include employees whose primary duty is the management of the business enterprise) must be paid at least \$970 per week on a salary basis to maintain the exemption from the Fair Labor Standards Act requirements on minimum wage and overtime.

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- Administrative employees (defined at 29 CFR 541.200-204 to include employees whose primary duty involves the exercise of individual judgment on matters of significance to the business enterprise) must be paid at least \$970 per week on a salary or fee basis to maintain to preserve the exemption.
- Professional employees (defined at 29 CFR 541.300-304 to include both learned professionals and creative professionals) must be paid at least \$970 per week on a salary or fee basis to preserve the exemption.
- Computer employees (defined at 29 CFR 541.400-402 to include programmers, systems analysts and software engineers but not employees who build or maintain computers) must be paid at least \$970 per week on a salary or fee basis to preserve the exemption.

The proposed rules more than double the amount of yearly salary necessary to maintain the exemption from the current \$455 per week or \$23,660 per year to \$970 per week or \$50,440 per year.

New U.S. Department of Labor Interpretation Addresses “Economic Realities” Test in Classifying Workers as Employees or Independent Contractors

Update 7/30/2015

Noting an increase in cases where employees have been misclassified as independent contractors, the U.S. Department of Labor, on July 15, 2015, published Administrator’s Interpretation No. 2015-1 addressing the application of the “economic realities test” to the determination of whether a worker is an employee or an independent contractor.

The interpretation, which includes examples and case law, is clear that it is the economic relationship of the parties, and not a label or agreement designating a worker as an independent contractor, that controls under the wage and hour provisions of the federal Fair Labor Standards Act (FLSA). “The ultimate inquiry under the FLSA is whether the worker is economically dependent on the employer or truly in business for him or herself. If the worker is economically dependent on the employer. Then the worker is an employee. If the worker is in business for him or herself (i.e., economically independent from the employer), then the worker is an independent contractor.”

The interpretation then discusses the application of the six factor economic realities test noting that each factor is to be examined in relation to the other factors with no single factor being given undue weight.

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The interpretation then discusses the application of the six factor economic realities test noting that each factor is to be examined in relation to the other factors with no single factor being given undue weight.

The six factors, expressed in question format, are:

- A. Is the work an integral part of the employer's business? The interpretation notes that a worker's work can be integral to the business even if it is also performed by hundreds of others doing the same thing. (The example given is a call center worker who is one of many workers answering telephone inquiries.) Work can be integral to the business even – as with telework and flexible schedules – it is performed away from the employer's premises.
- B. Does the worker's managerial skill affect the worker's opportunity for profit or loss? The interpretation notes "...in order to inform the determination of whether the worker is in business for him or herself. This factor should not focus on the worker's ability to work more hours, but rather on whether the worker exercises managerial skills and whether these skills affect the worker's opportunity for both profit and loss."
- C. How does the worker's relative investment compare to the employer's investment? The interpretation notes "An analysis of the worker's investment, even if that investment is substantial, without comparing it to the employer's investment, is not faithful to the ultimate determination of whether the worker is truly an independent business."
- D. Does the work performed require special skills or initiative? The interpretation's example for this factor notes the relationship between managerial skills and true independent contractor status.
- E. Is the relationship between the worker and the employer permanent or indefinite? The interpretation notes that permanency or indefiniteness points to an employer-employee relationship but a lack of permanence does not necessarily suggest an independent contractor relationship.
- F. What is the nature and degree of the employer's control? The interpretation notes that technological advances and enhanced monitoring mechanisms may encourage companies to engage workers not as employees but still exercise stringent controls over the workers' behavior. "The control factor should not overtake the other factors of the economic realities test, and like the other factors, it should be analyzed in the context of ultimately determining whether the worker is economically dependent on the employer or is an independent business."

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UPDATE July 30, 2015

A copyrighted article in today's *Wall Street Journal* reports that the potential for penalties for misclassification of employees has forced many companies that have relied on workers as independent contractors to reclassify them as employees. The costs involved in such a reclassification can have a business-killing effect on companies that operate on very thin margins. The article also notes that the possibility of a business having to pay substantial amounts in back wages and taxes has served as a disincentive to venture capital investments in businesses that now utilize workers classified as independent contractors. The article, "*Startups Scramble to Define Employee*" appears on page B1 of today's edition.

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